Supreme Court of the United States

OCTOBER TERM, 1955

No. 48

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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CASES CITED

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I. The First Amendment

A

In our principal brief we pointed out that one of the First Amendment vices of the Act is that it is not limited to, and is unnecessary for, the elimination of any evil which Congress has the power to control. The Act, as we showed, suppresses petitioner as a whole, and with it petitioner's admittedly extensive peaceable advocacy and assembly (Pet. Br. 26-33, 91-107).

The respondent does not contest our demonstration that the Act is and was intended to be an outlawry statute. Nor does it dispute our legal argument that an outlawry statute is invalid.

Again, respondent does not attempt to meet our argument that the clear and present danger exception has no application to the Act, and that the section 2 finding of

such a danger is immaterial (Pet. Br. 96-97). Yet it proceeds as if it had refuted the argument. The whole thrust of respondent's brief is that the Act is valid because Communism is a great danger, or at least that Congress said so (Br. 94-97). The respondent's thesis comes down to the untenable proposition that if there is a danger (or even if Congress merely has declared one), Congress may hurl an H-bomb on its general direction, on the "reasonable" theory that no matter what else is slaughtered the peril will be eliminated.

Another point with which the respondent does not cope is our demonstration that the Act, and to an even greater extent the Board's order and the affirmance below, violate the First Amendment because they impose the destructive registration requirement and intolerable sanctions on the basis of beliefs and protected expression (Pet. Br. 113-19, 170-74). The respondent makes no effort to refute either our analysis or the legal conclusions which we drew therefrom.

B

The respondent's First Amendment discussion of the registration provisions is vitiated by its untenable assimilation of the Act to non-invidious and non-discriminatory genuine disclosure statutes. The respondent ignores the defamatory nature of registration under the Act,[1] the onerous sanctions imposed on those called upon to register, and the likelihood of criminal prosecution of any who do register. These features make disclosure by registration impossible. They also demonstrate that it was never intended, as does the fact that disclosure is not an adequate or appropriate remedy for espionage, sabotage, seditious

[1] John Lord O'Brian, recently observed in a Godkin Lecture at Harvard: "Defamation, historically the most foul of all weapons used to impair integrity, has become a commonplace of reckless usage both in governmental proceedings and in the comment of the general public." O'Brian, *National Security and Individual Freedom* (1955), 65.

advocacy, and the other evils claimed to justify the Act, all of which are punishable under existing criminal legislation.

Respondent's discussion isolates the registration requirements of the Act from the sanctions, apparently in recognition of the fact that the sanctions are incompatible with respondent's assumption that the Act is merely a disclosure statute. For the same reason, respondent repeatedly suggests that the Court disregard the sanctions in this litigation (Br. 42, 88-9, 163-64). This suggestion was more strongly urged by respondent in the court below, which rejected it (R. 2081-84). The suggestion is clearly unsound.

The Act provides that once a registration order becomes final, two sets of consequences follow automatically. First, the organization and its officers are under a duty, enforceable by criminal penalties, to file a registration statement. Second, the organization and its members incur onerous disabilities and liabilities. The latter penalties are not imposed for failure to register, but are operative *whether the organization registers or not.* No further action is required to put them into effect. Like the registration requirement, they are direct and immediate consequences of the order, written into it by the Act. It was an immaterial matter of draftsmanship that Congress attached these consequences to the order by force of the Act, instead of directing the Board to write them into the order, as in the case of the registration requirement.

The registration order thus fires a double-barrel shot gun against petitioner. It is disingenuous to suggest that, in examining the consequences of the order, the Court should disregard the shot from one barrel and the wounds it inflicts. It is manifestly impossible to make an intelligent determination of the constitutionality of the order without considering all of the sanctions which it automatically invokes.

The respondent distinguishes *Thomas* v. *Collins*, 323 U. S. 516, on the ground that it involved "no problem of sedition, subversion" or foreign control (Br. 101). The principle of *Thomas* v. *Collins* is that registration may not be made a condition of the right to make a lawful speech. The Board's argument recognizes that the Act violates this principle, but suggests extenuating factors. We think, however, that it is an untenable assumption that the Court would have decided *Thomas* v. *Collins* otherwise if the state had had some reason to believe that Thomas was a security risk or a foreign agent. So long as his speech would not endanger security, his right to make it could not validly be conditioned on registration, no matter what his general character might be.

The fact that speech cannot be abridged on the basis of the identity or character of the speaker is established by *DeJonge* v. *Oregon*, 299 U. S. 353. It held that a person could not be prevented from making a lawful speech merely because, as the Court assumed, he and his organization were security risks (Pet. Br. 114, 93, 97; see also *Herndon* v. *Lowry*, 301 U. S. 242). The Board distinguishes *DeJonge* on the grounds that "There the disability imposed was criminal punishment * * *, not the much milder form of 'restraint' in the form of registration and disclosure requirements" (Br. 101). But in the first place, the registration requirements of the Act and their attendant sanctions are not mild restraints, being at least as onerous as most criminal penalties. Secondly, *DeJonge* did not rest on the factor of criminal punishment. Its thesis, which applies to civil as well as criminal sanctions, was stated as follows (at 364-65):

> "These [First Amendment] rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse."

The impermissible theory of the Act that all of an organization's advocacy can be proscribed once the organization is governmentally branded is epitomized by the requirement (sec. 7(d)(6)) that the registration statement list all printing and duplicating equipment (Pet. Br. 142). Respondent makes no effort to defend the validity of this provision, but ignores it altogether.

C

The respondent asserts that the Act's invidious labelling requirement "imposes no censorship" because the content of the matter mailed or broadcast "is immaterial" (Br. 166). But obviously a restraint of expression regardless of content is a more flagrant abridgment of speech and press than a limitation of content. It is only on the basis of content (as where there is obscenity, fraud, or matter creating a clear and present danger of insurrection) that Congress has any power to inhibit speech and press (Pet. Br. 105-07).[18]

There being available no justification based on content, the respondent argues that the invidious label may be required so that the public may be informed of petitioner's alleged ulterior motives (Br. 168-69). The respondent's argument throws overboard the principle that the clear and present danger exception is the only qualification of the First Amendment's unequivocal command. Never before so far as we are aware, has it even been suggested that

[18] Cf. President Eisenhower's advice to the Dartmouth graduates of 1953: "Don't join the book burners. * * * Don't be afraid to go in your library and read every book as long as any document does not offend our own ideas of decency. That should be the only censorship. How will we defeat communism unless we know what it is? What it teaches—why does it have such an appeal for men? * * * Now we have got to fight it with something better. Not try to conceal the thinking of our own people. They are part of America and even if they think ideas that are contrary to ours they have a right to have them, a right to record them and a right to have them in places where they are accessible to others. It is unquestioned or it is not America." *N. Y. Times*, June 15, 1953.

Congress may restrain speech which threatens no substantive evil because of the suspected motives of the speaker. If such a power is held to exist, then the First Amendment will lose its significance.

Contrary to respondent's argument, Congress has no power to "protect" the population by "exposing" the ulterior motives of those who address the public. In this area the people must protect themselves without the guardianship of the legislature. We believe that the amicus brief of the American Civil Liberties Union is correct in stating (24-5):

> "Certainly, knowledge of whether a person is a Communist, or of his various motivations, biases, and preconceptions may be valuable in appraising the validity of his ideas, and the benefit of associating with him. But in a democracy, the function of obtaining or using this knowledge cannot be transferred from the hands of the citizen to the Government. As Mr. Justice Jackson said in a succinct statement of democratic faith: 'It is not the function of our Government to keep the citizen from falling into error.'"

D

The respondent justifies the Act's sanctions by the argument that they are reasonable exercises of Congressional power in areas within the federal jurisdiction. If this were true, the sanctions would meet the test of due process, but not necessarily the more stringent clear and present danger test of the First Amendment (Pet. Br. 100-01). Respondent overlooks the fact that the member sanctions must be justified under First Amendment standards because they are imposed solely for the exercise of and heavily deter the right of association.

The fact is, however, that the Act's sanctions do not even satisfy the reasonableness requirement of due process. They are reasonable only on the respondent's H-bomb theory of Congressional power.

Thus the Respondent argues that since Congress can protect the mails and broadcast channels against fraudulent communications, it can "protect" them against non-fraudulent communications of petitioner or other unpopular organizations. Since Congress can compel non-invidious identification of broadcast sponsors, it can require petitioner and other unpopular organizations to defame themselves in their broadcasts. Since Congress can forbid federal employees from engaging in partisan politics, it can forbid them and employees of private "defense facilities" from making contributions to petitioner and other unpopular organizations for legitimate uses which have nothing to do with partisan politics. Since Congress can guard defense facilities against sabotage and espionage, it can exclude from employment at such facilities members of petitioner and other proscribed organizations even if they have no desire, tendency, or opportunity to engage in sabotage and espionage. Since *Douds* held (we think incorrectly) that Congress can, as a means of preventing political strikes affecting interstate commerce, put pressure on unions to remove Communists from leadership positions, it can prohibit Communists and members of other proscribed organizations from holding non-leadership union employment having nothing to do with strike policy or interstate commerce.[2] Since Congress can prevent persons from travelling abroad to commit espionage, it can prevent Communists and members of other proscribed organizations from travelling abroad for such innocuous purposes as collecting a legacy, studying ancient ruins, or comforting a dying

[2] Respondent contends that we were in error in stating (Pet. Br. 103) that section 5(a)(1)(E) does not purport to be an exercise of the commerce power. It asserts that "the paragraph is limited to the holding of office in or employment with labor organizations as defined in the National Labor Relations Act, the scope of which in turn is limited by the commerce clause" (Resp. Br. 192). Respondent's assertion is incorrect. The definition of "labor organization" in the latter statute (28 U. S. C. 152(6)) is made without reference to interstate commerce, the commerce restriction in that statute being elsewhere.

parent. Since Congress can revoke naturalizations obtained by fraud, it can revoke naturalizations by inventing an irrational presumption of fraud (Rep. Br. 164-99). None of this is good law.

What the respondent's theory comes down to is that all members of proscribed organizations (including the huge number of "members" of petitioner artificially created by section 5 of the Communist Control Act) may be conclusively presumed to be criminals and deprived, without hearings for the individual or other ado, of any privileges Congress wishes to withhold. This is simply the McCarthy theory that the Constitution does not apply to Communists and people he calls Communists.

II. The Privilege Against Self-Incrimination

In our principal brief (83) we urged that the Act and the registration order are invalid because they compel petitioner's officers to incriminate themselves by performing an act—the signing and filing of petitioner's registration statement—which constitutes an admission of their membership in petitioner and "a knowledge of its workings."[3]

The respondent contends (Br. 104-12) that adjudication of this issue is premature in this proceeding. It urges, first, that the privilege may never be asserted by the officers, and that those officers who desire to assert the privilege can do so on the registration form to be filed with the Attorney General.

This argument overlooks the crucial fact that the assertion of the privilege to the Attorney General is itself an incriminating admission that the persons asserting it are officers of the petitioner (Pet. Br. 87-88). The opportunity for claiming the privilege which respondent proposes is

[3] Petitioner has standing to litigate this issue because the registration requirement directly injures it (Pet. Br. 72).

simply an opportunity for the officers to incriminate themselves. The procedure suggested by the respondent would confront the officers with an illusory alternative: to make the incriminating admission that they are officers of the organization by signing and filing the registration statement, or to make the same admission by asserting the privilege not to sign and file the statement.

The officers of petitioner must somewhere be able to obtain judicial protection against the requirement of the registration order that they make the incriminating disclosure that they are petitioner's officers. Since an assertion of the privilege by them, under the circumstances of the case, would surrender the privilege, the assertion cannot be a prerequisite to adjudication of their rights. This proceeding provides the only opportunity they have to secure the benefit of the privilege.[4] Hence the issue is not premature.

Respondent also contends that the privilege issue is premature because a claim of privilege, if and when asserted, might be found to have been waived by certain of petitioner's officers because of facts peculiar to their individual situations.[5] This argument has the same vice as the contention that the issue is premature because the officers might not claim the privilege at all. The point is that the Act allows no effective opportunity for the officers to claim the privilege. Hence it is impossible to withhold adjudication until the claim is made or until, having been made, it is determined whether the claimant had waived the priv-

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[4] It cannot be urged that the officers can enjoy the protection of the privilege by remaining silent until indicted for failure to file a registration statement. For, as the respondent acknowledges (Br. 109), the privilege is a protection against prosecution as well as conviction.

[5] Respondent's argument is made in disregard of the well-settled proposition that the privilege is not waived by prior admissions made extra-judicially, or in another proceeding, or even at a different stage of the same proceeding (Pet. Br. 89).

ilege. No one knows who will be the officers of petitioner at the time when it becomes necessary to file a registration statement. They may well be, or include, persons whose right to the privilege will not be complicated by any question of waiver. Yet if the Court abstains from deciding the privilege issue now because of some speculative possibility of waiver, the last opportunity for protecting the constitutional privilege of these persons will have gone by. In short, adjudication cannot await disposition of an issue which could only arise on assertion of the privilege, because the Act allows no opportunity for the assertion.

The respondent's refusal to recognize that, in the setting of the registration order, an assertion of the privilege is itself incriminating blinds it to the applicability of *Boyd* v. *United States*, 116 U. S. 616, which held a federal statute invalid on its face, because it conflicted with the privilege against self-incrimination. *Boyd* decisively refutes all of respondent's arguments.

As the respondent points out, the statute considered in *Boyd* presented a suspected tax evader with the alternative of (1) producing his books to refute the charges against him or (2) suffering the charges to be taken as confessed. The respondent states that, "In the context of such a statute, a claim of privilege would have been quite meaningless." It was for this reason, as respondent observes, that the Court voided the statute without reference to the doctrine that the privilege must be asserted if it is to be availed of (Br. 114-5). For the same reason, the Court did not permit the statute to survive for application to future cases in which the privilege might have been waived.

The "alternative" which confronts an officer of petitioner under a registration order is no more satisfactory than that in *Boyd*. The officer must choose between making an incriminating admission by signing a registration statement and making the same admission by claiming his privilege not to sign the statement. Here an assertion of the privi-

lege would be worse than "quite meaningless." It would itself be incriminating. Hence, as in *Boyd*, the principle that the privilege must be claimed in order to be relied upon is inapplicable.

The respondent's blind spot also appears in its argument that, "Even assuming that a claim of privilege will be made and must be honored, this would make the order to register at most unenforceable, not void" (Br. 112). This argument proceeds on the same fallacious premise that petitioner's officers must claim the privilege in order to have it honored. As we have seen, however, there is no place other than this proceeding in which their privilege can "be honored." And the only way in which that can be accomplished in this proceeding is by holding the registration order invalid.[6]

The situation here is identical with that presented in *Boyd* where, as respondent states (Br. 116), "The statute was held void as necessarily conflicting with the privilege." The Act and the registration order must be held void for the same reason.

The respondent's final contention is that, on the authority of *United States* v. *White*, 322 U. S. 694, the privilege is not available to petitioner's officers (Br. 117-21). Respondent's brief ignores one of the crucial factors which distinguishes the situation here from that in *White*. *White* relaxed the Fifth Amendment only to the extent of holding that the officer of an organization is not privileged to withhold records of the organization on the ground that their *contents* might incriminate him. Here, it is not the contents of the records but the identification of the person signing the statement as an officer and member of petitioner which is incriminating. Such self-identification cannot be compelled (Pet. Br. 83, 86-7).

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[6] Moreover, as *Boyd* shows, a statute which on its face violates a constitutional right is void notwithstanding the possibility that it may have a valid application to hypothetical persons under speculative conditions.

The second vital distinction is that *White* involved the bare act of producing the records of the organization, while a registration order requires the officers to prepare and file an original statement (Pet. Br. 84-6). The respondent's argument that there is no significant difference between the two requirements (Br. 117-21) contradicts the Court's expressions in *White, Wilson* v. *United States*, 221 U. S. 361, and *Shapiro* v. *United States*, 335 U. S. 1, and does violence to the principle of the Fifth Amendment (Pet. Br. 84-85).

III. The Act and Due Process

A. The Act as Fiat Legislation

Under the section 3(3) definition, there can be a Communist-action organization only if there is a world Communist movement as defined by section 2. The Act, however, does not leave the existence of such a movement open to administrative or judicial determination. The legislative findings as to the existence, nature, and control of the world Communist movement are binding on the Board and the courts, and the court below so held (R. 2132-3). Accordingly, the Act violates due process since it predetermines, by legislative fiat, facts essential to guilt (Pet. Br. 56-59).

The respondent acknowledges that the existence of a world Communist movement as described in section 2 is not "subject to litigation in a particular proceeding under the Act" (Br. 127-8). Simultaneously, it recognizes that the existence of the world Communist movement is crucial to making the Act "operative against petitioner" (Br. 125). It contends on two grounds that this legislative predetermination of crucial facts does not violate due process.

First it argues that the section 3(3) definition contains two components, both of which "must be fulfilled for the definition to apply" (Br. 124). This is beside the point. Both components of section 3(3) presuppose the existence

of the world Communist movement described in section 2, and neither can possibly apply if such a movement does not exist. The vice of the Act is that the necessary factual foundation for both components is determined by legislative fiat.

Secondly, the Board argues that the existence and nature of the world Communist movement are legislative facts, "general conclusions which support the policy of a particular law," and not adjudicative facts, "which, on proof in adversary litigation, bring a specific person or organization within the purview of the legislation, or otherwise make the general terms of the legislation specifically applicable" (Br. 126).

The findings in section 2 were, of course, intended to "support the policy of" the "particular law." The difficulty, however, is that Congress did not stop there. Instead, it made liability under the Act dependent on the existence of "facts" which are only found legislatively. It did this by incorporating in section 3(3) the findings of section 2 as assumptions of fact which must be accepted by the Board and reviewing courts.

As the analysis in our principal brief showed (58), and as elementary common sense demonstrates, the existence of a world Communist movement as defined in section 2 is an indispensable factual element to a conclusion that a particular organization, (1) is controlled by the government or organization which controls that movement, and (2) operates to advance the objectives of that movement. Accordingly, the existence of such a movement is a fact necessary to bring an organization "within the purview of the legislation" and to "make the general terms of the legislation specifically applicable." The Board's brief makes no attempt to disprove our analysis and offers no counter analysis of its own. It merely offers the ipse dixit that the existence of a world Communist movement is not an adjudicative fact.

The hypothetical analogy suggested by the Board (Br. 128, ftn. 33) does not help its case. If indeed Congress should enact legislation authorizing an administrative agency to prohibit types of business activity found on the basis of evidence to deepen "the" world-wide economic depression, due process would require that a company involved in a proceeding before the agency be permitted to prove that there was in fact no depression which its activities could deepen. What impresses the Board about this analogy is the inefficiency of a system which would permit countless businesses to relitigate the same basic question. But the point is that Congress does not legislate such gaucheries. When Congress enacts economic legislation to alleviate a depression, it does not make the existence of a depression the foundation of the administrative findings, even though it may be the reason for the enactment. Instead, it authorizes the administrative agency to make findings as to whether certain practices deemed harmful by Congress are being employed, such as unfair competition, wage cutting, price-cutting, etc.[7]

It is only in the Act that Congress has incorporated legislative findings into the ultimate standards to be applied by the administrative agency. It is only in the Act that an element essential to the determination of liability is based on an assumption of facts found by Congress and not subject to administrative or judicial adjudication.

This legislative predetermination was not impelled by a need to avoid such wasteful relitigation as that contemplated by the Board's hypothetical analogy. For Congress intended that only one organization, the petitioner, should be charged as a Communist-action organization. But Congress knew that it had already enacted legislation prohibiting the seditious and insurrectionary conduct described in section two, and requiring foreign agents to register. It

[7] The legislation may also, of course, be of temporary duration or subject to termination by a joint resolution or presidential proclamation declaring the end of the emergency.

also knew that the Attorney General had been unable to make out a case against petitioner under these statutes. The problem to which the authors of the Act addressed themselves was how to dispense with the embarrassing necessity of proving their accusations against petitioner. That is why the Act was passed, and that is why the legislative predetermination of the existence of "the world Communist movement" was incorporated into the operative provisions of the Act (Pet. Br. 35-40).[8]

For the same reason, the authors of the Act also found it necessary to coerce an administrative determination of the other facts essential to guilt. It did this in section 2 by making findings on the identical subjects which were ostensibly to be determined by the Board, even to the point of identifying the petitioner as "the" Communist-action organization (Pet. Br. 42-45). Respondent makes no attempt to defend this aspect of the legislative predetermination.

B. The Irrationality of Section 13(e)

We argued that section 13(e) of the Act authorizes the Board to find that an organization is a Communist-action organization within the section 3(3) definition on the basis of evidentiary criteria which are irrelevant to the definition. Thus the Act permitted the Board to find petitioner guilty of one thing on proof of another, in plain violation of due process (Pet. Br. 46-53, 64-69).

The respondent's over-all reply to our contention is that the inquiry as to the relevancy of the standards of section 13(e) to the 3(3) definition is unimportant (Respt. Br. 132-34). It asserts that 13(e) does not supply "tests or criteria" of a Communist-action organization, but merely "relevant considerations or guides to the consideration of

[8] The demonstration in our principal brief (35-40) that the Act is an expedient to dispense with proof of guilt is corroborated and further documented by the respondent's own description of the background and legislative history of the Act (Br. 43-65).

evidence bearing upon the question." The "sole and exclusive test," it insists, is supplied by section 3(3). (Br. 132-33.) But this contention is merely an exercise in semantics, since "considerations or guides" are "tests or criteria," and the question is whether they are "relevant." Section 3(3) cannot be the "exclusive" test since Congress saw fit to enact 13(e) and to provide that in reaching its determination the Board should take into account the items listed in that section.

The respondent also urges (*ibid.*) that section 13(e) cannot invalidate the Act because its standards are not exclusive and do not preclude the Board from considering other factors relevant to the definition. The argument ignores the holding in *Bailey* v. *Alabama*, 219 U. S. 219 (Pet. Br. 66), that a statute which authorizes a judgment to be reached on irrational premises is invalid on its face notwithstanding that the trier of fact may base its judgment on rational premises. Respondent also ignores the elementary logic that if any one of the propositions on which a conclusion is based is invalid, the conclusion has not been demonstrated to be valid.[9]

Furthermore, if the respondent's argument could rescue the Act, it would invalidate the order of the Board. For it appears from the face of the Report (R. 1-137) that the Board rested its order solely upon its findings under the eight criteria of section 13(e). The Report examines each criterion separately, makes a finding adverse to petitioner under each, and concludes, without more, that petitioner is a Communist-action organization. Nowhere does the Report consider the evidence apart from its relevance to the criteria, or attempt to relate the evidence to the ultimate

[9] It follows that the Act is invalid if any one of the section 13(e) criteria is irrelevant to the ultimate issue (Pet. Br. 66).

facts set forth in the section 3(3) definition.[10] Accordingly, if the respondent is correct in its present contention that the Board was required to consider factors in addition to those enumerated in 13(e) and that section 3(3) provides the exclusive criteria for Board consideration, the order must be set aside for the failure to meet this requirement.

Respondent intimates (Br. 134) that it is unnecessary to determine whether the criteria are relevant to the definition for the further reason that almost everybody (including the Court) knows that petitioner is a Communist-action organization, and hence that a trial of that question is an unimportant formality. The suggestion is that because petitioner might be found guilty in a public opinion poll, no proof was required.

The respondent is driven to these lengths in its efforts to by-pass consideration of the 13(e) criteria because its defense of the criteria is plainly unavailing.

1. We showed that section 13(e) cannot supply a rational basis for decision because none of its criteria is relevant to the "objectives" component of the section 3(3) definition—i.e., that the accused organization operates primarily to advance the objective of overthrowing the

[10] The case was presented by the Attorney General and tried by the hearing panel on the same theory of the function of section 13(e). The petition, after an introductory section, is divided into eight separate parts corresponding to the eight criteria of section 13(e) (R. 143-59). All of the petition's allegations were subsumed under, and pleaded as relevant to, one or another of the eight criteria. The hearing panel, with the acquiescence of the Attorney General, required the latter to indicate the particular criteria under which he was offering particular lines of evidence. This requirement was made and agreed to on the theory that section 13(e) provided an exclusive standard of relevance, and that evidence not relevant to one or more of the criteria was inadmissible (see, e.g., Tr. 2444-45; 3133; 3202; 3795-96; 3804). Neither the Attorney General nor the panel took the position that evidence irrelevant to any of the eight criteria was, nevertheless, admissible as relevant to the ultimate facts to be established.

Government by violence or other illegal means and replacing it by a foreign-controlled dictatorship. (Pet. Br. 46).

It appears from the respondent's own analysis of section 13(e) that seven of the eight criteria do not relate to the "objectives" component of the definition but, at most, are relevant only to "foreign domination and control" (Resp. Br. 134-50). The respondent does argue that the first criterion ("directives and policies") is relevant to the objectives component. It urges that consideration of "the extent to which [the accused organization's] policies are formulated and carried out * * * to effectuate the policies of the foreign government or foreign organization" referred to in section 2 requires consideration of the policies of the foreign government as a whole. It says that, "These would certainly include at least those major objectives referred to in §2 as presenting a clear and present danger to the security of the United States, i.e. * * * the forcible overthrow of the government." (Br. 135-36.)

This analysis is faulty for two reasons.

In the first place, section 13(e)(1) contains two standards which are stated in the disjunctive. The Board is directed to consider the extent to which the organization's policies are made and implemented *either* (1) pursuant to foreign directives, *or* (2) to effectuate the policies of the foreign government. Obviously, the first of these alternatives has nothing to do with the content of the organization's policies or objectives, and the respondent does not argue to the contrary. It is only the second alternative which, according to the respondent, is relevant to the issue of seditious objectives. But section 13(e)(1) does not require the Board to consider this alternative. Hence the Board is authorized to find that an accused organization operates to advance the seditious objectives described in section 2 in the absence of evidence which satisfies the only clause of 13(e) that respondent claims has any relevance to such objectives.

Further, the respondent acknowledges that the second alternative of 13(e)(1) requires consideration of the policies of the foreign government as a whole, including "any 'good' objectives—objectives which might 'be shared by' and 'benefit' the United States" (Br. 136). Obviously, however, evidence of these "good" objectives cannot be proof that the organization operates to advance seditious objectives. Therefore the second alternative itself permits consideration of irrelevant evidence.

The correctness of our contention that section 13(e) as a whole has no relevance to the objectives component of the 3(3) definition is confirmed by the position which the respondent urged upon the court below and which the court adopted in its opinion.

The respondent took the position below that it is unnecessary to prove, and that the Act does not require proof, that an accused organization operates to advance the seditious objectives which section 2 attributes to the world Communist movement.[11]

The court below adopted the respondent's then interpretation of the Act. This is established by the excerpts from the opinion quoted by us (Pet. Br. 67) and referred to by respondent (Br. 137-38, ftn. 35). It is clear from these excerpts that the court believed that the "policies" criterion of section 13(e)(1) can be fully satisfied by proof that the accused organization seeks the establishment of a "totalitarian dictatorship" in this country, regardless of the fact

[11] We called attention to this fact in our principal brief (46), and the respondent does not contradict our statement. In its brief below, the respondent stated (p. 72): "As we have shown, however, the whole theory that underlies the registration features of this Act in relation to a Communist-action organization is that the mere fact of foreign domination justifies Congress in imposing disclosure requirements. Whether the individual foreign controlled policies are good or evil is irrelevant." The respondent added in its brief below (p. 111) that "the advocacy of force and violence is not the prime issue in this proceeding, but * * * is a relevant matter to be considered on the issue of allegiance."

that the means used or advocated for the attainment of this objective are entirely peaceable and lawful (see Pet. Br. 68). That this was the position of the court below is further evidenced by the fact that, in affirming the order of the Board, it found it unnecessary to determine whether or not the evidence established that petitioner advocated the violent overthrow of the Government (see Pet. Br., 155-56), an issue which the Board had informed it was not of prime importance and was relevant only to the allegiance criterion.

As we have shown, the position taken below by the respondent and adopted by the court was correct. Accordingly, the Act is unconstitutional because it establishes an irrational system of proof. It was the respondent's belated recognition of this fact which forced it to change its position. If the Court should, however, accept respondent's present position, the Board's order must nevertheless be set aside. For in that event, the case was decided by the Board and the court below upon an erroneous interpretation and application of the Act.

2. With respect to the foreign control component of the section 3(3) definition, section 13(e) supplies criteria which, at best, are nebulous, circumstantial and largely irrelevant (Pet. Br., 47-52). The respondent's counter-analysis of the criteria confirms our criticism. Its attempt to rescue the criteria takes two forms.

First, respondent urges that even if each criterion has no tendency to prove foreign control when considered separately, the deficiency is remedied by considering them cumulatively (Br. 134, 146). But the sum of eight zeroes is zero, and the respondent fails to explain how the vacuity of the individual standards is cured in the ensemble.

Second, it argues that while the criteria as written may have little or no relevance to foreign control, this vice can be cured by surrounding each criterion with a series of qualifications and encrusting it with factors which Con-

gress neglected to supply.[12] Thus the respondent concedes that the bare fact of reporting (which is all that section 13(e)(5) involves) may "suggest nothing in the way of control or domination" (Br. 143). Respondent then proceeds to catalogue a long list of "surrounding circumstances," not enumerated in the Act, which it says "might very well indicate" domination and control. Again, respondent acknowledges that the receipt of foreign financial aid (which is all that section 13(e)(3) involves) has little tendency to prove domination of the donee by the donor (Br. 140-41). It agrees with us that the relevant consideration is not the fact of aid, but the terms and conditions on which it is given. Yet respondent fails to explain why Congress enumerated the irrelevant, but omitted the relevant, factor. Similarly, respondent concedes that the fact that members of an organization receive foreign instruction and training has little significance in the absence of evidence that the organization is obliged to or does conform to the teaching in the conduct of its affairs (Br. 142). Yet section 13(e)(6) requires no evidence of the latter.

Respondent interprets the "non-deviation" criterion to require evidence that the "local organization mirrors in each facet of its activities through the years the policies of a foreign state" (R. 139-40). Yet in applying the criterion, the Board and the court below rejected this interpretation (Pet. Br. 137-44). Accordingly, if respondent's present contention is sound, the order of the Board and the decision below were based on an erroneous premise (see *infra*, pp. 33-35).

The respondent's discussion of the "discipline" and "allegiance" criteria (Resp. Br. 143-44, 147-50) does not meet our objection (Pet. Br. 50-52) that both are irrational because they permit the Board to impute to an organization the disciplinary status or subjective attitudes

[12] If the argument is sound, it condemns the Board's order, since the Board applied the criteria strictly as written. See *infra*, p. 29.

of some of its officers and members notwithstanding that they may be an unrepresentative minority whose views are not shared by the organization itself.

Respondent concedes that each of the two "purpose" requirements of the "secret practices" criterion involves circular reasoning (Br. 145-46). It urges that the criterion is nevertheless rational because the two requirements are stated in the disjunctive. The argument seems to be that the irrationality of both requirements is cured by virtue of the fact that only one of them need be proved. We cannot fathom this logic.

C. The Necessarily Biased Board

Under the Act, all future business of the Board was dependent on its finding that petitioner is a Communist-action organization. A finding in favor to petitioner would (as two chairmen of the Board themselves recognized) have made the Board *functus officio* and in effect repealed the Act (Pet. Br. 54-56). We argued, therefore, that the Act violated due process by creating a Board which was under irresistible pressure to decide in one direction and which had a personal, official and financial stake in the result (Pet. Br. 70-71).

The respondent does not dispute our analysis of the Act, nor does it discuss the numerous authorities cited by us which demonstrate that the Act therefore violates due process. Instead, it misrepresents our contention as "charging that the structure and scheme of the Act are such that it would be impossible to staff the Board with members who would not enter upon their duties with the intention of violating their oaths of office" (Br. 130). The issue, however, has nothing to do with violations of oaths of office. What due process requires is that the tribunal be free from pressures to decide against a litigant and from an interest in the event. Violation of the oath of office is a standard for impeachment, but is not required for disqualification. Does the Solicitor General assert that when

the government moved to disqualify Judge Youngdahl in the *Lattimore* case, it was charging that he would violate his oath if he continued to sit?

D. The Denial of Due Process to Members

The Act imposes onerous disabilities on individuals solely because of their organizational membership. It conclusively presumes that every member is a loyalty and security risk who must be denied vital privileges, regardless of his lack of personal knowledge of the organization's claimed deleterious nature. In these respects, we argued, the Act violates due process (Pet. Br. 72-5).[13]

The respondent defends the member sanctions on the ground that they apply only to persons who remain members with knowledge or notice that the organization has been condemned after an administrative hearing and judicial review. It scoffs at the notion "that it is not permissible to impose sanctions on a member if he does not agree * * * with the formal finding made by the Board and upheld by the courts" (Br. 203-4).

But the notion is right and respondent is wrong. A person cannot constitutionally be branded and discriminated against as a loyalty and security risk merely because he is so stubborn (as well as courageous and possibly right) as to disagree with an estimate of the Board and the courts. Otherwise he is punished for nothing more than nonconformity.

This is established by *Adler* v. *Board of Education*, 342 U. S. 485. The statute involved in *Adler*, like the Act, provided for a hearing to the organization and judicial review. Nevertheless, in upholding the statute, the Court stated (at 494-5, emphasis supplied):

> "Membership in a listed organization found to be within the statute *and known by the member to be*

[13] The Act also violates due process because it excludes members from privileges to which loyalty and security considerations are not germane (Pet. Br., 101-05; *supra*, pp. 7-8).

> *within the statute* is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural due process. *The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it.*"

According to respondent, the only element in the quoted text that is necessary to satisfy due process is that the organization be "found to be within the statute." Its argument eliminates the other two elements which the Court recognized as indispensable—knowledge by the member that the organization is (not was found to be) of the objectionable kind, and an opportunity to the member to rebut the presumption arising from such knowing membership.

Respondent seeks to escape *Adler* by misinterpreting our reliance on it. We did not contend, as respondent supposes (Br. 205), that *Adler* requires that the member be permitted to relitigate the character of the organization. What we said (Pet. Br. 73), and what *Adler* holds, is that a finding that an organization is disloyal cannot, consistently with due process, conclusively establish the "disloyalty" of its members. The members must be allowed an opportunity to rebut any presumption of "disloyalty" arising from membership before sanctions can be imposed upon them. Since the Act provides no such opportunity, it violates due process.[14]

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[14] The sanctions are invalid for the additional reason that they are imposed on the members notwithstanding the fact that an organization may be found to be a Communist-action organization without proof that it engages in any illicit advocacy or criminal activity whatsoever (see Pet. Br. 46; *supra*, pp. 17-20). Cf. the statute in *Adler* where the disqualification of the members was conditioned on a finding that the organization advocated the violent overthrow of the Government.

It is not true, as respondent contends (Br. 204-05), that sanctions for disloyalty may be imposed on a present member without regard to his lack of personal knowledge that the organization has evil purposes. As *Adler* establishes, scienter is a prerequisite because its presence is necessary to a rational inference of disloyalty from organizational membership. As the Court recognized in *Wieman* v. *Updegraff*, 344 U. S. 183, 190, membership in a "subversive" organization "may be innocent in the absence of scienter." The principle which makes scienter necessary applies to present membership as well as to past. *Adler* considered scienter a requisite, yet the statutory exclusion there involved applied only to present members.

The respondent misreads *Wieman* in representing that it applies only to past membership. The test oath struck down in that case related to both present membership and membership within the preceding five years. The decision, however, was squarely based on the oath's failure to allow for the absence of scienter, without distinction between present and past members. *Wieman* itself stated (at 188) that it was decided "in the context of" three decisions (*Adler*; *Garner* v. *Board of Public Works*, 341 U. S. 716; and *Gerende* v. *Board of Supervisors*, 341 U. S. 56), which it considered to have established scienter as a constitutional requisite. Yet two of these cases (*Adler* and *Gerende*), involved only present membership.

Respondent's theory that organizational membership per se makes individuals loyalty and security risks is particularly terrifying in view of the fact that it justifies sanctions imposed not only on members of petitioner and other organizations proscribed under the Act, but also on the huge segment of the American population which artificially and unwittingly acquires "membership" in petitioner by the operation of section 5 of the Communist Control Act.

The respondent's suggestion that petitioner lacks standing to challenge this denial of due process to its members

is based on a misrepresentation of our position. Respondent states that "petitioner raises this issue on behalf of its members, none of whom are [sic] before the Court" (Br. 202, ftn. 60). We raised the invalidity of the member sanctions on behalf of petitioner, pointing out that since "the disabilities imposed by the members directly affect and injure petitioner," petitioner may challenge them (Br. 72). The respondent's brief confirms our analysis, for it argues (204-05) that the member sanctions are valid because the members can escape them by resigning from petitioner. Thus, according to the respondent, what makes the member sanctions constitutional vis-a-vis the members is that they operate to destroy petitioner by eliminating its membership. Surely petitioner can challenge on its own behalf measure whose purposes and effect is to destroy it.

IV. The Act as a Bill of Attainder

We have dealt (Pet. Br. 63) with the respondent's contention, based on an unsound dictum in *Douds*, that the sanctions on the members are not punishment because the members can escape them by resigning from the organization. This argument confuses retroactivity with punishment, and the prohibition against bills of attainder with that against ex post facto legislation. The point is that recantation coerced by the threat of punishment is itself punishment.

The respondent recognizes that the organization has no escape from the punishment inflicted on it by a registration order, but asserts that the punishment indispensable to a bill of attainder "must be visited on individuals" (Br. 207). We do not believe that the prohibition against bills of attainder is so narrow. Moreover, the argument overlooks the real significance of the registration requirement, the sanctions on the organization, and the compulsion exerted on members to leave the organization in order to escape the

Act's sanctions. The effect of these provisions is to compel the members to quit the organization. They thereby deprive the members of their privileges of association and concerted expression. This deprivation is inescapable; it is based on past conduct; and it has no reasonable relation to the personal fitness of the members to enjoy the privileges which the Act denies them. By any standard, therefore, the Act punishes the members.

V. Section 5 of the Communist Control Act

Respondent (Br. 157-58) makes a twofold reply to our contention (Pet. Br. 76-79) that the criteria of section 5 of the Communist Control Act for determining membership in the Communist Party are vague and irrational. First it says that the thirteen criteria which the section lists are not exclusive. But the vice of authorizing a jury to consider the thirteen irrelevant factors is obviously not cured by permitting it to consider other factors which may be relevant. Second, respondent says that the criteria are to be applied by the jury "under instructions from the court," and that it must be presumed that the guidance of the court will be intelligent. But respondent does not explain how it is possible to give "intelligent guidance" for the use of irrational standards of proof.

Respondent argues that since the introductory paragraph of section 5 refers to the determination of membership of "the accused person," the section has no bearing on the liability of the officers to list persons other than themselves in the registration statement (Resp. Br. 158-59). Such a literal reading would add a further irrational feature to the registration requirements of the Act. Respondent does not dispute that individuals must apply the criteria of section 5 in determining whether to register themselves if the organization has failed to list their names (Br. 159). Under the respondent's interpretation, a person is not a member for the purpose of registration by the organization,

but is a member for the purpose of self-registration. Clearly, this double standard could not have been intended.

If section 5 is held to enumerate valid criteria of membership whenever membership of an accused person is in issue, the courts will undoubtedly apply the same criteria in all other proceedings where membership is in issue, including prosecutions of petitioner and its officers for failure to list the names of all "members". That Congress intended this result appears from paragraph (14) of section 5 which describes the previous thirteen paragraphs, without limitation, as "subjects of evidence on membership or participation in the Communist Party."

Respondent urges finally (Br. 156) that our attack upon section 5 is premature. This contention is patently fallacious if, as we contend, petitioner and its officers must, at their peril, apply the standards of section 5 in preparing a registration statement.

Moreover, the question is not premature even if section 5 is not applicable to the obligation of petitioner and its officers to list the names of petitioner's members. As we showed, section 5 makes it dangerous for any person to associate with petitioner, have business dealings with it, or express views on any subject similar to those held by it. If he does so he may thereby incur the criminal penalties which the Act imposes on members of petitioner for violating the employment and passport sanctions and for failure to register themselves (Pet. Br. 75-82). He is also exposing himself to prosecution for various other offenses, such as violation of the membership clause of the Smith Act, perjury and false statements for denials of membership in petitioner, etc. Section 5, therefore, works a present and direct injury on petitioner by frightening away its audience and suppliers of business and professional services. It quarantines petitioner and its views completely. Petitioner therefore has standing to challenge the validity of the section in this proceeding (see Pet. Br. 72).

VI. The Misapplication of the Act

A. The Erroneous Construction and Application of Section 13(e)

We have earlier noted the discrepancy between the Board's reliance on the criteria of section 1[illegible]) as the exclusive grounds for its ultimate conclusion, and respondent's present theory that these criteria are neither exclusive nor significant (*supra*, p. 16).

The Board's application of 13(e) was also inconsistent with its other current theory that the section's criteria *can* be rationally applied because the Board must consider not merely the "bare" fact to which a criterion refers, but also the more material facts to which the criterion does not refer, including, the "total picture," the "context," the "entire factual background," the "surrounding circumstances," and "the degree." (Resp. Br. 141-44; *supra*, p. 21.) In applying the criteria, the Board paid no attention to the total picture, the context, the factual background, the surrounding circumstances, or questions of degree. So much is clearly visible from the Board's Report, which confines itself to a discussion and finding as to the bare fact referred to in each criterion.

Accordingly, under the Board's current interpretation of the Act, the order must be set aside because it is based on a complete misapprehension of the function of section 13(e).

The Board's ultimate finding rested on its eight findings adverse to petitioner under section 13(e). It is now beyond dispute that the Board's reliance on four of these findings was misplaced. At least two of the findings were invalidated by the court below, and, as respondent points out two more concededly rest on remote evidence (Br. 217, ftn. 5; Pet. Br. 145-9, 154). Hence the respondent's brief defends only four findings (Br. 217-37).

It now appears, therefore, that the Board should have credited petitioner with favorable findings under four of the eight criteria. The Report nowhere assigns relative weights to the Board's findings under each criterion, and for all that appears, the Board relied at least as heavily on the four abandoned findings as on the four it still defends. Accordingly, a reversal is clearly required. (See authorities cited Pet. Br. 176-7.)

As to the four findings which respondent still defends, it fails to meet the criticisms made in our principal brief.

"Directives and Policies"

We stated in our principal brief that there was no evidence cited by the Board or in the record of receipt of foreign directives in any possible legitimate sense of the word, at least since petitioner's 1940 disaffiliation from the Communist International. As we also stated, there was no evidence that petitioner had any relations with the Communist International after its disaffiliation, that the Communist International survived its dissolution in 1943, that any organization ever succeeded the Communist International, or that petitioner has had any international affiliation since 1940. All the evidence is to the contrary (Pet. Br. 121). The respondent cites no evidence which contradicts the statements we made.

The absence of evidence of directives forced the Board to invent the palpably absurd theory, developed at great length in the Report, that the Marxist classics are Soviet directives (Pet. Br. 122-30). The respondent states that the Board did not base its "directives and policies" findings "exclusively upon the classics of Marxism-Leninism," and that "those works form but one part of the mass of evidence on which those findings were predicated" (Br. 223-24). The respondent does not, however, identify or analyze the "mass of evidence." This chore was done in our principal brief. There we pointed out that the Board relied on the

following matters, in addition to its theory that the Marxist classics are Soviet directives: (1) claimed receipt and following of Soviet directives prior to the 1940 disaffiliation of petitioner from the Communist International; (2) petitioner's adherence to the Marxist principle of democratic centralism; (3) petitioner's views on imperialism and its programs with respect to labor, the Negro people, and youth, which, since they are based on Marxist principles, "proved" to the Board that petitioner obeys the "Soviet directives" in the Marxist classics; (4) a few scattered irrelevancies which constituted the Board's post-Act "evidence" under this standard, such as the fact that the *Daily Worker* had a correspondent in Moscow (Pet. Br. 121-37, 164).

The respondent's brief does not dispute the accuracy of our summation of the Board's "evidence," nor does it explain how these absurdly irrelevant matters are probative. The respondent simply fails to refute, or even to come to grips with, our showing that for want of relevant evidence under the "directives and policies" criterion, the Board distorted the criterion and found compliance with "directives" on the basis of wildly irrelevant matter.

The respondent's brief does defend the theory that Marxism-Leninism is a set of Soviet directives, by asserting that the Board was referring to Marxism-Leninism "as understood, used and followed by" petitioner (Br. 219). But again the assertion is unfounded. The Board's finding that the Marxist classics are the source of Soviet directives was based on passages taken from the books themselves as construed by the Board (R. 21-38), not on evidence of petitioner's understanding of the books. This appears not only from the Report but from respondent's own review in its brief (221-23) of the Report's treatment of the subject.[15]

[15] The Report also referred to certain oral testimony to support its views as to the meaning of Marxism-Leninism. This consisted of conclusory testimony of Lautner and Budenz giving their personal interpretation of Marxist Theory (R. 39-40), and the testimony of

Moreover, one of the grounds on which the Board refused to accept petitioner's testimony as to its understanding of Marxist principles is that the testimony was not in accord with the Marxist texts as understood by the Board (R. 38-39).

But even if it were true that petitioner understood that Marxist theory was a set of Soviet "directives", to which it subjected itself by adhering to the theory, this would not prove the "directives and policies" standard as correctly construed. For that standard must refer to enforceable orders, not to voluntary adoption of an ideological position. Otherwise, the standard would have no possible tendency to prove the 3(3) definition, and the First Amendment defects of the Act would be multiplied. (See *infra*, pp. 44-45.)

"Non-Deviation"

The respondent's justification of the "non-deviation" standard on its face demonstrates that the Board misapplied the standard. The respondent argues that "non-deviation" is a valid criterion because, "The fact that a local organization mirrors in each facet of its activities through the years the policies of a foreign state is surely pertinent to proof of its control by that state" (Br. 139-40). If this is what 13(e)(2) means, the Board misapplied it in at least three respects.

In the first place, the Board could not legitimately find that "each facet" of petitioner's activities corresponded to Soviet policies. On the contrary, the evidence was uncontradicted that petitioner took positions on many matters on which the Soviet Union did not express a view (R. 1225-27). Moreover, the Report itself reveals that the evidence on which the Board relied to support its finding on "non-deviation" did not relate to "each facet" of petitioner's

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others that petitioner's official position was that it believed in and should be guided by Marxist-Leninist principles (R. 41). The respondent's failure to discuss this irrelevant testimony in its brief is obviously discreet.

activities, but was confined to selected questions of international relations (R. 80; Pet. Br. 137).[16]

Secondly, the Board did not consider whether or not petitioner's views on these selected issues *mirrored* Soviet views. Mirroring requires an existing Soviet view which petitioner could reflect. The Board disregarded this requirement, by holding that the "non-deviation" test was satisfied by a showing that petitioner and the Soviet Union held similar views. It rejected and refused to consider two kinds of evidence which would have rebutted whatever inference of mirroring might arise from evidence of similarity.

The first subject relevant to mirroring which the Board refused to consider was whether the Soviet view preceded or followed petitioner's view, and hence whether or not there was an exising view which petitioner could mirror (Pet. Br. 138-40). The respondent seeks to escape this circumstance by citing seven (of the 45) "parallelisms" in which, since Soviet action was involved, the Soviet view presumably came first (Br. 229-30). But this is no justification for the Board's reliance on the 38 parallelisms in which the priority of views was not established.

The Board also refused to consider whether the similarity of the specified views of petitioner and the Soviet Union was the result, not of mirroring, but of the independent application by each of the premises and analytical approach supplied by Marxist principles. And it precluded petitioner from proving that such indeed was the case (Pet. Br. 143).[17]

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[16] The respondent's brief misrepresents the facts when it states (225), "Petitioner does not deny the fact of the identity of its program and policy with that of the Soviet Union." See R. 1225-27. The respondent's brief itself eventually reduces its charge to a mirroring of views "on every significant aspect of world politics" (Br. 226).

[17] It is significant, in this respect, that the Attorney General's own expert witness on "parallelism" admitted that his testimony could not establish that the similarity of views was not the product of independent thought (Pet. Br. 143-4).

This refusal of the Board to apply a "mirroring" test is ignored by respondent's brief and is impossible to justify.

Finally, the Board's application of the "non-deviation" standard is fatally at variance with its current interpretation of the standard because the Board refused to consider whether or not the policies it examined were in fact "the policies of a foreign state" (i.e., of the Soviet Union). To impart any rationality to the non-deviation test, it must be confined to policies which are peculiar to the Soviet Union or, at most, shared with it by Communists of other countries. If a policy is generally accepted or widely held by non-Communists; if the view is merely a factual position which may well be accurate (such as that the Chiang Kai-shek regime when on the mainland was corrupt); if the view tends to promote the interest of the United States, and is the official policy of the United States government, then it is not a "Soviet view". The fact that a domestic organization subscribes to such views does not support a conclusion that it is dominated and controlled by the Soviet Union. Nevertheless, the Board refused to receive or consider evidence that the views in question were generally accepted, widely held by non-Communists (including, in some cases, the government of the United States), demonstrably true, and in the interests of the United States (Pet. Br. 140-42). It approved the position taken by the Attorney General at the administrative hearing, that "it does not matter * * * whether the Soviet view was held by many people, by some people, or by all the people" (Pet. Br. 141).

The Board now belatedly recognizes the invalidity of the position on which it made its "non-deviation" finding, for it concedes that a common belief in arithmetic or a common opposition to racial discrimination is not evidence of the existence of foreign domination or control (Br. 227). It declares, however, that the case is different when there are "sudden reversals" of position on political questions, citing three claimed instances (Br. 227, 229-30). It asserts, "The evidence at bar was of the latter type" (Br. 227-8).

The assertion is false. Aside from the three instances cited by the Board's brief, there was not even a claim that the views involved "sudden reversals".[18] Moreover, no justification is or can be offered for the Board's refusal to allow the petitioner to prove that the claimed reversals of position were attributable to circumstances other than foreign control.[19] And even if there were unexplainable "sudden reversals", the Board was unjustified in relying on the numerous parallelisms which were not reversals.

The Board not only misinterpreted the "non-deviation" standard in applying it, but also attached erroneous significance to its finding on the subject. The court below held that the "non-deviation" criterion was relevant only to the foreign control component of the section 3(3) definition, and not to the objectives component (R. 2121-22). It did so because it recognized that the criterion embraces views which are in the best interests of the United States (*ibid.*, Pet. Br. 142). We accused the Board of having plainly erred, because, contrary to the holding of the court, it utilized its finding on non-deviation to support its ultimate finding on *both* components of the definition (Pet. Br. 142, 175). The respondent asserts that there is no basis for contending that the Board and the court below "were in disagreement as to the evidential effect of the 'non-deviation' finding" (Br. 226-27, ftn. 68). We believe that we were correct. The Board's Report contains no indication that its "non-deviation" finding was not used to support both components of the ultimate conclusion. That it was so used is demonstrated by the Board's brief below, which stated (87, emphasis added):

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[18] For a sampling of the views relied on by the Board, see Pet. Br. 141, ftn. 80. The respondent's brief itself recognizes (230) that not all the parallelisms were claimed sudden reversals.

[19] "Many thoughtful people and patriotic American citizens in 1938 and 1939 were not enthusiastic about our getting into war. Violent changes in the thinking of our people occurred in a short period of time before and after Germany broke with Russia." *United States* v. *Lattimore*, 112 F. Supp. 507, 519.

> "A reading of the Annotated Report in the Appendix of this brief (pp. 147-158) clearly shows that it is reasonable to infer domination and control *and operation to advance the world Communist movement* from the application made of this ["non-deviation"] criterion. Indeed, under the evidence the Board could not infer otherwise."

And even in its brief before this Court the Board at one point maintains the position that "non-deviation" "is evidence, to be weighed with all the other evidence, that the foreign power controls the domestic organization *and that the domestic organization operates primarily to advance the objectives of the world Communist movement*" (Br. 226, emphasis supplied).

"Discipline"

In our principal brief we described all the evidence on which the Board relied under the "discipline" criterion. The inescapable conclusion from our summary was that the Board misapplied 13(e)(6) by utilizing petitioner's self-adopted internal disciplinary practices to "prove" that petitioner's officers and members were under foreign discipline (Pet. Br. 150-52).

The respondent's brief does not dispute the accuracy of our summary of the evidence on which the Board relied, nor does it explain how instances of internal discipline can have anything to do with the foreign "discipline" test of section 13(e). Its defense is that there is "other evidence" apart from the "discipline" standard which "inexorably points to the fact that petitioner is Soviet-controlled" (Br. 232). It does not cite the evidence to which it alludes, and there is none. In any event, respondent's argument is not responsive to the question whether the Board's finding of foreign discipline was based on a misapplication of the "discipline" standard.

The Board's application of the "discipline" standard is one more example of its failure to conform to the interpre-

tation of section 13(c) now advanced by it to support the section's validity. We argued that the "discipline" standard is irrational on its face, because it permits an organization to be condemned on the basis of the attitude of some of its leaders or members, notwithstanding that those may be an unrepresentative or dissenting minority and that the organization itself is completely independent (Pet. Br. 50). Respondent replies (Br. 144):

> "But the possibility of this result does not negate the propriety of the inquiry, which is into 'the *extent* to which' the organization's leaders and members are under foreign discipline * * * it is the *degree* * * * which the Board is directed to consider. If the evidence is equivocal or insignificant * * * the record will so show. It cannot be assumed in advance that the Board will be governed by trivial evidence or evidence having no real probative force with respect to the ultimate issue, or that Congress so intended." (Emphasis in original.)

The Board, however, in applying the "discipline" standard, made no finding as to, and did not consider, the "extent" or "degree" of the foreign discipline. And it clearly was "governed" by trivial evidence which had no probative force with respect to the criterion or to the ultimate issue.

"Allegiance"

Our principal brief examined the four bases on which the Board rested its "allegiance" findings and argued that all four represented a misapplication of the standard (Pet. Br. 154-8). The respondent's brief defends only one of the Board's four premises, namely, the conclusion that petitioner advocates the violent overthrow of the government (Br. 233-7).[20]

Insofar as the Board's conclusion rested on Marxist literature, it was, of course, inconsistent with *Schneider-*

[20] This represents a "sudden reversal" by the Department of Justice, which did not allege such advocacy in the petition and contended at the administrative hearing that evidence of such advocacy was relevant only to the findings of section 2 (Pet. Br. 154, ftn. 91).

man v. United States, 320 U. S. 118. The respondent feebly distinguishes *Schneiderman* on the ground that the Board had before it Marxist literature published after 1927, as well as before (Br. 236-37). But the Board did not distinguish between the earlier and the later literature. In fact, the Report relies primarily on the early literature, as it must since the current writings in evidence, which it studiously ignores, refute its finding (see, e.g., Pet. Exs. 55, 58).

Moreover, one of the two "later" works to which the Board points in support of its contention (Br. 237) is not a "later" work at all. Stalin's *Foundations of Leninism* was considered in *Schneiderman* (at 150-51) under its earlier title, *The Theory and Practice of Leninism*. Indeed, *Schneiderman* (at 151, ftn. 38) quotes from *Foundations* the identical excerpt quoted and relied upon by the Report in support of its finding on "allegiance" (R. 119).

The respondent also defends the finding on advocacy of violent overthrow on the ground that it was based not only on Marxist literature, but also on the testimony of ten witnesses who had formerly been members of petitioner, and whose membership "spanned the entire existence of the Party until January 1951" (Br. 234-5).

The first thing to observe is that of these ten witnesses (named in the Report at R. 121), the membership of only one extended into the post-Act period. This was the ineffable Harvey Matusow, to whom even the Board is now unable to give any credence (Pet. Br. 213). The other nine witnesses had been separated from petitioner as far back as 1929 (Gitlow, the "former General Secretary of the Party"—Br. 235); 1934 (Kornfedder); 1936 (Nowell); 1939 (Honig); 1940 (Johnson); 1942 (Crouch); 1945 (Meyer and Budenz, the latter "a former managing editor of the *Daily Worker*"—Br. 235); and 1949 (Hidalgo) (R. 134-35). Thus the Board's finding rests on remote evidence, and was contrived by ignoring the more contemporaneous contrary testimony of the Attorney General's own witness.

Lautner, who was separated from the Party in 1950 (R. 135), a date later than any of the nine witnesses last mentioned (Pet. Br. 207).[21]

Moreover, of the ten witnesses relied on by the Board, three (Johnson, Crouch and Matusow) were the subject of petitioner's motion to adduce additional evidence to show that their testimony could not be credited on any subject (Pet. Br. 212-16). Yet the respondent defends the denial of the motion on the ground that the testimony of Johnson, Crouch and Matusow was of no consequence to the Board's order (Br. 279-84).

Again, despite the Board's assertions to the contrary (Br. 235-36, ftn. 74), the record, we insist, bears out our contention that Meyer's testimony could not support the force-and-violence finding, that Honig and Johnson on cross-examination contradicted their original testimony on the subject, and that Budenz' contribution was proved to be a typical invention. (See Pet. Br. 205-7, and record references there given.)

The above explains why the court below did not express concurrence with the Board's finding on violent overthrow, but affirmed the "allegiance" finding (we insist incorrectly) without reference to petitioner's claimed advocacy of force and violence (Pet. Br. 155-56).

B. The Erroneous Use of Pre-Act Evidence

The respondent agrees with us that the Act required the Board to base its findings and order upon relevant policies and practices of petitioner subsequent to the date of the Act. It further agrees that petitioner's conduct prior to

[21] The Board's claim that we misstated Lautner's testimony (Br. 236, ftn. 74) is without foundation, as can be readily seen by examining the portions of the record cited at Pet. Br. 207 and those claimed to be of a contrary tenor cited in the Board's Brief at 236, ftn. 74.

that date can be relevant only to the extent that it may help to interpret or explain the significance and purpose of post-Act conduct. (See Pet. Br. 160-61; Resp. Br. 238-39).

In our principal brief (162-66) we summarized every item of post-Act evidence referred to in the Report and relied upon by the Board. The respondent does not challenge the accuracy of our summary, except to say (Br. 241-42) that one item was stated "more pointedly" by the Board than by us. An inspection of these items of post-Act evidence, disinterred from the overwhelming mass of discussion of pre-Act evidence, belies the respondent's undocumented assertion (Br. 238) that the findings and order of the Board "are based on petitioner's current practices and activities * * *." Nor does respondent challenge our statement (Pet. Br. 166) that none of the six factors which the court below relied upon as determinative of the case against petitioner involved relevant post-Act conduct.

Respondent denies (Resp. Br. 240-42) that the post-Act evidence set forth in our summary is, as we contend, irrelevant and immaterial both to the criteria of section 13(e) and to the section 3(3) definition of a Communist-action organization. However, it points to only two items of the post-Act evidence, neither of which lends any support to its position.

The first item relied on by respondent is that subsequent to the date of the Act petitioner adopted views similar to those of the Soviet Union on certain international questions (Resp. Br. 241). The Report reveals (R. 83-84) that these views were that the People's Republic of China should be seated in the United Nations, that the United States and the United Nations should not have intervened in the Korean war, that the Synghman Rhee regime was reactionary, that a Korean cease-fire should be negotiated, and that prohibition of the use of atomic weapons, as proposed in the Stockholm peace petition, was in the interest of world peace. As the court below held, however, and as respond-

ent sometimes seems to concede, this application of the "non-deviation" criterion has no relevance whatsoever to the "objectives" component of the section 3(3) definition (see *supra*, pp. 35-36). Nor does petitioner's advocacy of these views, which were likewise advocated by many non-Communists, have any tendency to prove the "domination and control" element of the definition as now construed by respondent itself (see *supra*, p. 34).

The only other item of post-Act evidence on which respondent relies (Br. 241-42) is the fact that many years ago a number of petitioner's present leaders visited and studied in the Soviet Union. As respondent's quotation from the Report reveals (*ibid.*), the only conclusion the Board drew from that fact was that these leaders:

> "* * * have accepted the views and policies of the Soviet Union and have carried such policies into [petitioner], making them the views and policies of [petitioner]."

This finding has no evidentiary support. But even if it had, it is nothing but another application of the "non-deviation" criterion. And certainly the finding that petitioner and some of its leaders voluntarily "accepted" Soviet policies cannot establish that the Soviet Union "dominates and controls" either the leaders or the organization.[22]

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[22] Unable to point to any of petitioner's current activities which can support the order, respondent resorts to statistics to lend the post-Act evidence a spurious quantitative significance. It says (Br. 242) that 56 exhibits (out of 507) were published after the date of the Act, but it does not indicate the relevance of any of them, and they have none. Respondent lists 26 of these exhibits (Br. 242, ftn. 78). All of them with one exception (a certified copy of the indictment and other judicial records in the *Dennis* case) consist of books or articles published in newspapers and magazines. Sixteen of the 26 were offered in evidence through the witness Mosely to prove "non-deviation." Seven were placed in evidence by the Attorney General at the close of his case and were not the subject of any testimony. The remaining three consist of the published proceedings of petitioner's 1950 national convention. Respondent further says (*ibid.*) that 500 (out of 14,400) transcript pages were occupied by the testi-

Respondent's defense of the Report confirms our statement (Pet. Br. 166) that, at most, the post-Act evidence establishes only that petitioner (1) is an American political party which subscribes to the principles of Communism and (2) advocates certain policies on international questions which it believes to be in the interest of peace and which are similar to policies of the Soviet Union. After a fifteen-month hearing, 14,400 pages of testimony, and 507 exhibits, respondent rests its case on matters that petitioner has long and publicly proclaimed, and which it re-asserted in its answer to the petition (R. 165-66).

The respondent avoids a defense of the Board's reliance on a presumption of "continuance" (Pet. Br. 168) by denying that the Board employed one (Resp. Br. 240). The Report, however, contradicts this denial (R. 130).[23] Furthermore, respondent does not take issue with our statement (Pet. Br. 169) that the court below based its affirmance on a similar presumption. Nor does it challenge our demonstration that the court's reliance on such presumption, like the action of the Board, was plainly erroneous and requires a reversal (Pet. Br. 168-69).

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mony of witnesses whose membership in petitioner extended beyond the date of the Act. This is a statistical overstatement, since most of the testimony of these witnesses related to pre-Act matters. Respondent does not indicate how many of the 500 pages contain testimony relating to petitioner's activities after the date of the Act. Although it states that these witnesses "testified extensively concerning the post-Act period," it nowhere describes this testimony or indicates its relevance, and it has none.

[23] The Report states (*ibid.*): "The law assumes in the absence of proof to the contrary, which [petitioner] did not establish to our satisfaction, that a condition or set of facts shown not too remotely in the past (all circumstances considered) to have existed, still continues. In the circumstances here presented we do not consider that the passage of the Act, in and of itself, affects this presumption respecting it."

C. The Insufficiency of the Evidence

The respondent cites the size of the record to support its argument that the Court should not review the sufficiency of the evidence (Br. 209-11). The size of the record, however, is of no consequence, since a reading of it is unnecessary to a determination that the Board's findings are not supported by a preponderance of the evidence as required by the Act. Moreover, it is amply clear that the court below did not make a fair assessment of the record on the issue of sufficiency. Both of these facts can be determined from a reading of the Board's Report, loaded though it is, and the opinion below.

The following facts emerge from such a reading:

1. Of the eight key findings made by the Board under section 13(e), the respondent can now only defend four. It has been forced to abandon the two findings (on "reporting" and "secret practices") which were invalidated by the court below, and two others (on "financial aid" and "instruction and training") which admittedly rested on utterly remote evidence. (See *supra*, pp. 29-30.) The fact that the court below sustained the Board's reliance on these two now abandoned findings, itself shows that the court did not make a fair assessment of the record.

2. It is plain from the Report and the opinion below that the Board's order is not supported by relevant evidence of post-Act conduct. (See *supra*, pp. 39-42; Pet. Br. 160-70).

3. As to the four key findings still defended by respondent ("directives and policies," "non-deviation," "discipline," and "allegiance"), it is plain from the Report that the absence of probative evidence to support them drove the Board to torture the terms of section 13(e) and to rely on evidence having no rational relationship to its standards or to the ultimate issue defined by section 3(3). (See *supra*, pp. 30-39.)

4. We showed in our principal brief that the Board's finding that there exists a world Communist movement "substantially as described in section 2 of the Act" was not supported by any evidence of the four factors which define the supposed movement. We also showed that the court's affirmance of the Board's finding on the subject was based on irrelevant matters (Pet. Br. 193-99.) The respondent's brief evades our demonstration on the subject, and defends the Board's finding merely by referring to some excerpts from early Marxist works (Br. 246-51).

5. The Report and the opinion below show that there is no evidentiary support for the ultimate finding that petitioner is a Communist-action organization.

As we showed in our principal brief (158-60), the six factors relied on by the court below to sustain the ultimate finding have no rational tendency to prove it. The respondent's brief does not contest our demonstration.

The only finding of the Board which is claimed to have any relevancy to the objectives component of the 3(3) definition is its finding on "directives and policies" (*supra*, p. 18). This finding, however, as we have seen, is a concoction based on the absurd thesis that Marxist literature constitutes "Soviet directives" (*supra*, pp. 30-32).

Nor is there any evidence which can prove the foreign control component of the 3(3) definition. If, as the Board contends, the Soviet Union gives "directives" to petitioner, then petitioner, if it carries them out, does so only because it wishes to. If, as the Board further contends, petitioner's views do not "deviate" from those of the Soviet Union, if some of its leaders and members recognize Soviet "discipline" or avow a superior "allegiance" to the Soviet Union, such "non-deviation," "discipline," and "allegiance" are voluntary and ideological only. There is no way by which the Soviet Union can enforce obedience to its directives, or acceptance of its views, and discipline, or loyalty to it. If financial aid were being given, the threat of its

withdrawal could possibly be a device of control. But the Board itself has found that there has been no such aid in many years.

This sort of adherence, even if it were proved, would not and could not constitute foreign direction, domination and control under section 3(3). The control envisaged by that section must be an effective, enforceable control, not a mere voluntary acceptance of policies, even if they have a foreign origin. Otherwise the definition would be hopelessly vague, and the Act would further violate the First Amendment by penalizing nothing more than an ideological agreement with "foreign" views.

We believe that our point has been well stated in the amicus brief of the National Lawyers Guild (p. 41):

> "The fact is that any reason for interfering with First Amendment rights of organizations under 'foreign control' is completely absent in the case of voluntary associations operating within the United States. Such associations are masters of their own decisions. Neither they nor their members are subject to any physical or police control from abroad. The organization operates under American laws, in an American environment, subject to everyday American customs, ideas and traditions, and it must secure the approval of American public opinion. Apart from financial contributions—a special issue, but not one involved here—the kind of 'control' exercised by a foreign government or organization is ideological in character. The American association or individual can always withdraw. What is designated by the Act as 'control', therefore, is in reality little more than ideological influence."

The respondent's brief abandons the Report, the opinion below, and the record. It rests on nothing but its ipse dixit and appeals to prejudice, hoping that references to claimed events in Czechoslovakia, Canada, Korea, and Australia, and to reports of Congressional committees, will be an acceptable substitute for proof.

D. The Unfair Hearing and the Affidavits of Bias and Prejudice

1. The respondent dismisses as innocuous and speculative the evidence supporting our claim that pressure was exerted on the Board members by the Senate Judiciary Committee at the very time when the Committee had before it for confirmation the nominations of the Board members (Pet. Br. 178-83). The Board's approach, however, ignores the realities of life. The chairman of the hearing panel, Board Member LaFollette, recognized the pressure to which respondent is oblivious (Pet. Br. 181). Moreover, the respondent overlooks the fact that the panel prevented the petitioner from fully developing the facts concerning the surveillance of the Board (Pet. Br. 180-81).

2. As to the affidavit of bias and prejudice filed against Board Member McHale, the respondent (Br. 272) suggests innocuous interpretations of her remarks. Dr. McHale's speech was brief, it appears in the printed record at R. 193-6, and we ask that the Court examine it and draw its own conclusions.

The respondent (Br. 275) likewise glosses over Board Chairman Brown's remarks made on an anti-Communist television-radio program while the case was still pending before the Board. The substance of these remarks appears in the printed record at R. 197-8 and 206-8, and we ask that the Court examine them. The Board also relies on the fact that Mr. Brown had already participated in issuing a recommended decision at the time the remarks were made. But Mr. Brown still had quasi-judicial functions to perform, including passing on exceptions to the recommended decision and participating in the final decision.

Even if the remarks of Dr. McHale and Mr. Brown had not exhibited bias and prejudgment, their public discussions of the pending case, before a political club in one instance and on an anti-Communist program in the other, were themselves such gross improprieties as to require disqualification of two of the four Board members who issued the Board's order.

E. The Failure to Remand the Proceeding for Administrative Redetermination

In our principal brief we urged that the court below was required to remand the proceeding for administrative redetermination because of its action in striking two key findings of the Board (on "reporting" and "secret practices") and in holding, in effect, that a third finding (on "nondeviation") was given an erroneous application (Pet. Br. 175-77).

Respondent claims that the findings as to "secret practices" and "reporting" were not stricken, but "modified" (Br. 260). The court, however, specifically stated as to "secret practices" that "we strike the finding as to purpose" (R. 2151). And as to "reporting" the court stated that "we would strike this finding as phrased" (R. 2149).

The pertinent question, however, is not the appropriateness of the label describing what the court did, but the effect of its action. The effect was to make each finding irrelevant both to the criterion under which it was made and to the section 3(3) definition.

Since the existence of one of the purposes described in section 13(e)(7) is an indispensable element of the "secret practices" criterion (Pet. Br. 51, 153-54) the decision below that there was a failure of proof of purpose necessarily invalidated the Board's finding that the evidence satisfied the criterion. Furthermore, it is obvious that the bare fact that petitioner engaged in precautionary practices has no relevance to the section 3(3) definition of a Communist-action organization.

Similarly, the holding below that the evidence failed to establish "constant, systematic reporting as of now" (R. 2149) necessarily invalidated the finding of the Board that the evidence satisfied section 13(e)(5). For the court itself (*ibid.*) held that the term "reports" as used in that section means such current, constant, systematic reporting.

The court's suggested substitute finding (*ibid.*) that "upon occasion" leaders of the party report to representatives of the Soviet Union" is contrary to the evidence (see Pet. Br. 150). But even if such a finding had evidentiary support, it would have no relevance to the section 3(3) definition. The respondent acknowledges as much when it states that the fact of "reporting" can have relevance to the definition only in connection with "such surrounding circumstances as the length of time the reporting goes on, the frequency of its occurrence, the conditions of secrecy under which it is carried out, the contents of the reports, the reasons therefor, and all the other background data" (Br. 143).

Accordingly, however, one may label the action of the court below, the effect of that action was to invalidate the Board's findings on these two criteria as bases for its order.

Respondent denies (Resp. Br. 259-60) that the Board applied the "non-deviation" criterion in a manner that the court held erroneous by using the finding under that criterion to support its ultimate conclusion as to the nature of petitioner's objectives. As we have seen, however (*supra*, p. 35), the denial is inaccurate.

Respondent attempts to distinguish *N.L.R.B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, by stating that there it was unclear from the record on just what evidence the administrative findings were based (Br. 261, ftn. 84). The Court, however, specifically stated (at 479) that it was remanding the proceedings for administrative redetermination because, "it appears that the Board rested heavily on findings with regard to the bulletin and the speeches, the adequacy of which we regard as doubtful." Again the Court said (at 476):

> "But here the Board's conclusion that the Independent was a company-dominated union seems based heavily on findings which are not free from ambiguity and doubt. We believe that the Board, and not this Court, should undertake the task of clarification."

Respondent's reliance on *N.L.R.B.* v. *Newport News Co.*, 308 U. S. 241 (Br. 261), is misplaced. For there the Court stated (at 244): "The Board's subsidiary findings of fact are not the subject of serious controversy," and it found (at 251) that the order of the Board was supported by "the uncontradicted facts."

The decision in *Virginia Electric* is controlling, and indeed the case for a remand is stronger here. The Board not only based its conclusion on findings adverse to petitioner under all eight criteria, but relied heavily on its findings with respect to "secret practices," "reporting," and "nondeviation" (Pet. Br. 177).[24] Thus the reviewing court cannot say that the Board would have reached the same result in the absence of the invalid findings.

The Act does not, as respondent suggests (Br. 261), authorize the reviewing court to substitute its judgment for that of the Board and to affirm an order on the ground that a preponderance of the evidence supports the Board's ultimate conclusion, even if it does not support key findings on which the conclusion rests. Section 14 of the Act does not direct the court to consider whether or not the *order* of the Board is supported by a preponderance of the evidence. What it requires is that the Board's *findings as to the facts* be so supported. Since the court below concluded that the record did not support key findings on which the Board based the order, the Act required a remand for administrative redetermination.

F. The Motion for Leave to Adduce Additional Evidence

Respondent does not challenge our statement (Pet. Br. 214) that the additional evidence petitioner offered to adduce would have completely destroyed the credibility of the Attorney General's witnesses, Matusow, Crouch and John-

[24] Our contention is confirmed by the concession respondent again makes (Resp. Br. 217) that the Board attached little weight to its adverse findings on "financial aid" and "instruction and training."

son. Nor does it deny the fact (Pet. Br. 212) that the Board made extensive use of the testimony of these witnesses in making its findings of fact.

Respondent quotes at length from its memorandum below in opposition to petitioner's motion, arguing that the Board could have disregarded the testimony of the three witnesses and reached the same result (Br. 279-83). But respondent has no answer to *N.L.R.B.* v. *Indiana and Michigan Electric Co.*, 318 U. S. 9 (see Pet. Br. 214-15), where the Court rejected this argument.

Respondent's position here is inconsistent with the Solicitor General's recent confession of error upon the petition for certiorari to review the denial of a new trial in *Kretske* v. *United States*, No. 91, this term. There, as the government stated, the evidence of guilt was clear and the newly discovered evidence was only impeaching (see Memorandum for the United States, p. 7).

VII. The Invalidity of the Appointments to the Board

Respondent contends that Article 2, section 2, clause 3 of the Constitution authorizes the President to make recess appointments to offices newly created by Congress during its session and remaining unfilled after its adjournment (Br. 291-98). Its argument is based primarily on considerations of administrative convenience. The framers of the Constitution, however, were perfectly aware that problems of administrative efficiency might arise from the requirement of Article 2, section 2, clause 2 that the appointive power of the President shall be exercised with the advice and consent of the Senate. Clause 3 accommodates the principle that executive power must be limited to considerations of administrative convenience only in the special circumstances, which the clause describes in terms that are carefully chosen and precisely formulated.

Clause 3 authorizes a presidential appointment without the advice and consent of the Senate only (a) where there is a "vacancy"; (b) where the vacancy "happens"; and (c) where it happens during "the Recess". If this provision means what its authors obviously intended from their choice of words, it is clear that none of these three conditions is satisfied in the case of an office which is newly created by an act of Congress (see Pet. Br. 186-87).

Respondent makes no reply to our contention that a vacancy does not "happen" in the constitutional sense when an office is newly created by law, but only when the vacancy results from death, resignation, promotion or removal. Yet this construction of the term "happen" was the basis for the action of the Senate in 1813 and 1822 and the principal ground for the decision in *Schenk* v. *Peay*, 21 Fed. Cas. 672 (Pet. Br. 186). It is also the ground for the distinction drawn by the commentators between the presidential appointive power in the cases of pre-existing and newly created offices (Pet. Br. 187).

Moreover, there is a plain distinction, even in terms of administrative convenience, between an office newly created by Congress and a vacancy in a pre-existing office. As to the latter, it can be urged, for example, that the death of an incumbent might occur during a session of Congress but not come to the knowledge of the President until after the adjournment, in which case he would not have had an opportunity to consult the Senate while it was in session. Contrariwise, the existence of a newly created office is always known by both the Congress and the President so that, if the matter is deemed of sufficient urgency, the Senate can remain in session to receive and act upon a nomination.

The statement by Madison relied on by respondent (Br. 294) makes no reference to the case of a newly created office. He states that it is only "*in cases of necessity and urgency*" that the power to make recess appointments was understood to comprehend vacancies that first occur during the session. The only examples of such cases that he puts

suppose that the President secured the advice and consent of the Senate, but that the appointments were frustrated by circumstances of which neither the President nor the Senate was aware—i.e., the death of the nominee before confirmation, or the refusal of the nominee to accept the appointment after Congress adjourned.

Respondent suggests (Br. 297) that there has been legislative acquiescence in the line of Attorney Generals' decisions which it cites, but it can refer to no legislative action which supports that suggestion. In fact, only five Attorney Generals' opinions deal with newly created offices, and two of these hold against the existence of the power to make recess appointments (Pet. Br. 187). Furthermore, the three opinions which support the existence of the power in the case of such newly created offices are contrary to the position taken by the Senate (Pet. Br. 186, 187, ftn. 111). Finally, those opinions which sustain the power as to pre-existing offices are not persuasive since they demonstrate that the existence of the power, even in that case, "has been practically asserted by Presidents only, and has not been recognized without constantly recurring suggestions by them of doubts as to its existence under the Constitution." *Case of the District Attorney*, 7 Fed. Cas. 731, 744.

CONCLUSION

The respondent discusses the Act and the order of the Board as though they affected no one but petitioner. It emphasizes that no other organization or individual is before the Court and insists that the isolated question which the case presents is the validity of the order that petitioner register as a Communist-action organization. It urges that "These facts will mold the frame in which the Court will view the case." (Resp. Br. 42).

We have shown in our principal brief and in this reply that even on this narrow view of the issues, the Act and

the order are plainly invalid. Yet we do not believe that the Court will adopt so limited a perspective in its approach to the grave constitutional and procedural questions which the case presents. True, these questions are brought here by an organization whose economic and political philosophy is undoubtedly repugnant to the Court. But that fact in nowise diminshes their gravity and importance to the future of the nation.

The proscription of the Communist Party would itself serve notice to the world that America has lost faith in the democratic process. But something even more fundamental is at stake. As the President observed when the Act was passed, it represents "a clear and present danger to our institutions" because it involves "breaking down the Bill of Rights in order to get at the Communists" (Pet. Br. 5, 6). Thus, the basic issue which emerges from the record is not Communism but the Constitution—not whether Communists are outside the pale, but whether the guarantees of individual liberty on which the Republic was founded shall survive to protect the whole people.

A similar question confronted the nation in its infancy when the Alien and Sedition Laws were enacted in the belief that war with revolutionary France was inevitable. Senator Mason of Virginia succinctly stated the issue of 1798 when he expressed the hope:

> "that the people will be brought to reflect before it is too late, and not suffer themselves to be deluded by a false and groundless clamor about French influence and a French party in this country, until all the foundations of their liberty are sapped, all the barriers of the Constitution broken down, and themselves reduced to a state of vassalage." [25]

[25] Letter to Matthew Lyon. *The Scourge of Democracy* (Fairhaven, Vt., 1798). The Act also recalls another shameful episode in our history, the 1920 expulsion of the Socialist members of the New York Assembly over the vigorous protest of Charles Evans Hughes and many others. Chaffee describes the inception of that proceeding as follows: "The Lusk Committee's resolution did not

Today, when the danger of war has subsided and international tensions are being reduced by peaceful negotiation, a hope similar to Senator Mason's is being voiced throughout America. The realization of that hope will be immeasurably advanced if the Act and the Board's order are set aside, and the liberties guaranteed by the Constitution are thus reaffirmed as the keystone to the security of our nation and its people.

Respectfully submitted,

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even recite that the members were charged with certain offenses, but stated facts as if already proved, an Alice-in-Wonderland performance of 'sentence first—verdict afterwards.' It declared that they were members of the Socialist Party, which adhered to the revolutionary forces of Soviet Russia and endorsed the principles of the Communist International of Moscow, and this was pledged to the forcible and violent overthrow of all organized governments." *Free Speech in the United States* (1948), p. 271.